Bodolay Packaging Machinery, Inc. *and* **United Electrical, Radio, and Machine Workers of America (UE).** Cases 12-CA-9491 and 12-CA-9584

August 12, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On December 31, 1981, Administrative Law Judge Donald R. Holley issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs and Respondent filed an answering brief to the General Counsel's exceptions, including a motion to strike the General Counsel's brief in support of exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Bodolay Packaging Machinery, Inc., Lakeland, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Robert Chartier immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any references to the unlawful layoffs of Donald Porter, Robert Chartier, and Jerry Hutchinson and notify them in writing that this has been done and that evidence of their unlawful layoffs will not be used as a basis for future personnel actions against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

[1] We deny Respondent's motion to strike the General Counsel's brief in support of his exceptions. Assuming that the General Counsel's brief may not, in all respects, strictly comply with the requirements of Sec. 102.46(c)(3) of the Board's Rules and Regulations, Series 8, as amended, the brief is "not so deficient as to warrant striking." *Viracon, Inc.*, 256 NLRB 245 (1981).

[2] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] The Administrative Law Judge, citing *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), found, in essence, that the General Counsel had failed to "make a *prima facie* showing sufficient to support the inference that [their union activities were] 'motivating factor[s]' in [Respondent's] decision" to lay off employees Murray, McDonald, Dotson, and Sprague. *Id.* at 1089. While the General Counsel excepts to these findings, we conclude that, even assuming the General Counsel had established such a *prima facie* case, Respondent rebutted that case in each situation.

We further agree with the Administrative Law Judge's finding that Respondent did not violate the Act by recalling employee Troy Ayres to work as an inspector on February 16, 1981, rather than employee McDonald. In so doing, we note that the record adequately supports Respondent's contention that it believed that Ayres was more capable of performing the required work than was McDonald.

We agree with the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(3) and (1) of the Act by laying off employees Porter, Chartier, and Hutchinson. Accordingly, and since our remedy would not be affected, we find it unnecessary to pass on the Administrative Law Judge's further finding concerning Respondent's failure to recall these employees on February 16, 1981.

For the reasons expressed in their separate dissenting positions in *Materials Research Corporation*, 262 NLRB 1010 (1982), Chairman Van de Water and Member Hunter adhere to their view that unrepresented employees are not entitled to the rights that were accorded represented employees in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). Nonetheless, as they are aware that their position is not prevailing Board law, they adopt, for institutional reasons and in the absence of exceptions, the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) by refusing to grant employee Vincent Sirera's request for representation at an interview at which he could reasonably have anticipated the imposition of discipline.

[4] The General Counsel excepts to the Administrative Law Judge's finding that employee Chartier's failure to respond to the registered letter that Respondent had mailed to him on February 20, 1981, offering reinstatement, extinguished Respondent's obligation to reinstate him notwithstanding the record evidence that Chartier never received the letter. We find merit in the General Counsel's exception and shall modify the recommended Order accordingly. See *Burnup & Sims, Inc.*, 256 NLRB 965 (1981).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate employees regarding their union activities or sentiments or the union activities or sentiments of their fellow employees.

WE WILL NOT create the impression among employees that their participation in union activities is under surveillance.

WE WILL NOT intimidate employees by threatening plant closure if employees select the Union as their collective-bargaining agent.

WE WILL NOT discourage employee participation in union activities by informing employees their participation in union activities caused them to be laid off.

WE WILL NOT require that any employee take part in an interview with supervision without the presence of an employee representative if such representation has been requested by the employee and if the employee has reasonable grounds to believe that the matters to be discussed may result in subjecting the employee to disciplinary action.

WE WILL NOT discourage employees from joining or participating in activities on behalf of United Electrical, Radio, and Machine Workers of America (UE), or any other labor organization, by selecting employees for layoff because they joined or supported a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Robert Chartier immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make whole employees Robert Chartier, Donald Porter, and Jerry Hutchinson for any loss of pay they may have suffered as a result of the discrimination practiced against them, with interest.

BODOLAY PACKAGING MACHINERY, INC.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge: Upon an original and amended charge filed in Cases 12-CA-9491 and 12-CA-9584, the Regional Director for Region 12 of the National Labor Relations Board (herein called the Board) issued a complaint on February 27, 1981, in Case 12-CA-9491, and an order consolidating cases and amendment to complaint on April 27, 1981, alleging, *inter alia*, that Bodolay Packaging Machinery, Inc. (herein called Respondent), had engaged in conduct which violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). Respondent filed timely answers to the complaints denying that it had engaged in the unfair labor practices alleged.

The matter was heard before me in Tampa, Florida, on July 13, 14, and 15, 1981. All parties appeared and were afforded full opportunity to participate. The General Counsel and counsel for Respondent filed post-hearing briefs which have been carefully considered. On the entire record in the case, the briefs, and arguments, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Florida corporation, maintains a place of business in Lakeland, Florida, where it is engaged in the manufacture of packaging machinery. During the 12-month period preceding issuance of the original complaint herein, Respondent, in the course and conduct of its business, sold and shipped goods valued at in excess of $50,000 to customers located outside the State of Florida. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that United Electrical, Radio, and Machine Workers of America (UE) (herein called Charging Party or the Union) is a labor oganization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is engaged at its Lakeland, Florida, facility in the design, manufacture, sale, and servicing of packaging and medical converting equipment. It normally utilizes in excess of 100 production and maintenance workers in its manufacturing and assembly departments. It is undisputed that such employees were supervised at times material herein by Respondent's president, Jack Bodolay; Russ Ehlers, shop superintendent; Frank Mazzio, assistant production manager;[1] Sid Hart, night-shift foreman; Dick Smith, machine shop foreman; Richard Litteral, assembly foreman; Jim Connelly, sheet metal foreman; John Boedicker, crib foreman; John Millen, production control foreman; and Leslie Bryson, assistant machine shop foreman.[2]

In late September 1980,[3] the Union began a union organizational drive at Respondent's facility. During the campaign, Respondent's employees attended union meetings, signed union authorization cards, distributed union literature, and wore union T-shirts and buttons at the facility.

Prior to December 5, Respondent had operated with two shifts; i.e., a day shift and an afternoon or night shift. Its president, Bodolay, testified without contradiction that the corporation failed to receive large orders it had contemplated receiving and found itself in a position in early December wherein it had to reduce expenses by

[1] Mazzio was no longer employed at the time of the hearing.

[2] Respondent admits, and I find, that each of the named individuals are, and have been at all times material, supervisors and agents of Respondent within the meaning of Sec. 2(11) of the Act.

[3] All dates are 1980 unless otherwise indicated.

some $12,000 per week. To accomplish this object, it abolished its afternoon or night shift on December 5[4] and thereafter laid off 18 day-shift employees on Monday, December 8.

The General Counsel claims that Respondent, through its above-named supervisors, engaged in numerous independent violations of Section 8(a)(1) of the Act during the union organizational campaign.[5] The General Counsel contends that Respondent violated Section 8(a)(3) of the Act by selecting seven named employees for layoff and by thereafter failing to recall such employees on February 16, 1981, because they engaged in union or other protected concerted activity. Finally, the General Counsel claims that Respondent violated Section 8(a)(1) of the Act by denying employee Vincent Sirera's request for representation during an investigatory interview which subsequently led to issuance of a verbal warning to the employee.

B. *The Alleged 8(a)(1) Violations*

Paragraphs 5 through 14 of the complaint alleges that various Respondent supervisors engaged in described violations of Section 8(a)(1) of the Act. The conduct attributed to each such supervisor is discussed below.

1. Sid Hart

Paragraph 6 of the complaint alleges that Hart unlawfully threatened employees with plant closure, and paragraph 7 alleges that Hart unlawfully created an impression among employees that their union activities were under surveillance by Respondent. The General Counsel sought to prove the violations alleged through the testimony of employees William Kauffman, Robert Chartier, and Donald Porter. Respondent claims Kauffman was a supervisory employee and that Hart's comments to him cannot be found to constitute violations of Section 8(a)(1). Hart did not appear as a witness and the comments attributed to him by the named employees stand unrebutted.

Employee Kauffman indicated that he discussed the Union with Foreman Hart on two occasions in September. On the first occasion, Hart asked him how many people from the night shift were involved in the Union. On the second, Hart informed him he had heard from an unnamed high-ranking company official that Jack Bodolay had said that rather than let a union come in there he would close the doors on the plant; that the reason he moved from Springfield, Massachusetts, in the first place was to get away from the union and he would not hesitate to close the doors. Hart again approached Kauffman early in October. During this conversation, Hart showed Kauffman a list which he said management had asked him to keep on second-shift employees. Hart called it a rating sheet. It rated employees from one through five, with one representing strong union attitude and five representing a strong company allegiance. Hart told Kauffman that his name was on the list, and that he had given him a four rating for his (Kauffman's) own protection. Hart explained that the list represented his assessment of second-shift employees' sentiment toward the Union, and was also a record of which employees were wearing union buttons and which were not.

Respondent contends in its brief (at pp. 11 and 12) that I should ignore Kauffman's testimony because he was a supervisor within the meaning of Section 2(11) of the Act. I reject the contention. During his testimony, Kauffman indicated he was a leadman when Hart conversed with him as described above. As a leadman, the employee was hourly paid at 25 cents per hour more than other lathe operators. While he indicated he was told what was to be accomplished by Hart and thereafter decided which employees were to accomplish different segments of work, the record reveals the tasks performed by the employees working under his direction were routine and repetitive in nature. While Respondent claims Kauffman had the authority to discipline employees, the employee testified without contradiction that he merely recommended to Hart that employees be disciplined and the foreman decided what action, if any, would be taken. Unlike admitted supervisors who are all salaried employees, it is clear that Kauffman never had the authority to hire or fire employees and he did not attend supervisors' meetings, grant time off, or select employees for overtime work. In sum, I find that Kauffman was not a supervisory employee and that through Hart's actions Respondent violated Section 8(a)(1) of the Act by: (1) unlawfully interrogating an employee concerning his union sentiments and the union sentiments of other employees; (2) creating the impression that the union activities of employees were under surveillance by Respondent; and (3) threatening plant closure if employees selected the Union as their collective-bargaining agent.

Employee Chartier testified that in mid-November Hart told him that Jack Bodolay would close the place if the Union ever got in the shop. Similarly, employer Porter testified that in November Hart told him "If the union gets in, I'm going to quit. Jack Bodolay said he's going to close the plant if it [the Union] gets in here." Through the described comments made by Hart to employees Chartier and Porter, I find that Respondent threatened employees with plant closure if they selected the Union as their collective-bargaining representative.

2. Jim Connelly

Employee Jerry Hutchinson testified that within a week of the time that he started to wear a union button, in September or October, Foreman Connelly asked him if he was with the Union. Additionally, Hutchinson indicated that Connelly talked against the Union on the described occasion and the employee claimed that Connelly subsequently snatched a union newsletter which Hutchinson had pinned on the backboard of a welding table and told him to keep such documents in his toolbox

[4] There were 22 night-shift employees laid off. See Resp. Exh. 5.

[5] At the hearing, the General Counsel amended the complaint to allege that on March 30, 1981, Respondent, through Jack Bodolay, threatened employees with plant closure if they continued their activities in support of the Union. Additionally, he sought to delete par. 14 of the complaint and to substitute therefor an allegation that "On or about October, 1980, the exact date being unknown to General Counsel, the Respondent, acting through John Bodolay, interrogated an employee about his union activity and desires of his fellow employees." It appears that I inadvertently failed to grant the described motion. I hereby grant the motion to amend the complaint as proposed.

rather than pin them on company property. Connelly denied that he asked Hutchinson if he was for the Union but did not refute the employee's account of the backboard incident. I credit Hutchinson's testimony and find that through Connelly's described conduct Respondent interrogated an employee concerning his union sentiments in violation of Section 8(a)(1) of the Act.

3. Leslie Bryson

Paragraph 11 of the complaint alleges that Bryson stated to employees at the time of the December 8 layoff that their employment was ceasing because of their union activities.

Employee Phillip Prior testified that as he was preparing to leave Respondent's facility after being laid off on December 8, he stated to Assistant Machine Shop Foreman Bryson that they had received a nice Christmas present from the Company. He claims Bryson replied, "Well you guys asked for it, you wanted to have a union and now you don't have a job."

Rather than state his version of the comments passed between he and Prior on December 8, Bryson simply denied that he told any employee around the time of the December layoff that they were being laid off because they supported the Union. I credit Prior's testimony and find that Respondent, through Bryson's described remarks, violated Section 8(a)(1) of the Act as alleged.

4. Jack Bodolay

Paragraph 5 of the complaint alleges that Bodolay violated Section 8(a)(1) of the Act during a meeting with employees on November 18 by threatening to discharge them if they continued to support the Union and by informing them it would be futile for them to select the Union as their bargaining agent. Paragraphs 12 and 14 of the complaint, as amended, allege that Bodolay unlawfully threatened employees with plant closure and that he unlawfully interrogated an employee concerning his union sentiments and the sentiments of others.

The General Counsel sought to prove that Bodolay made improper remarks when he departed from prepared text during a November 17 meeting with employees, through the testimony of employee witnesses Scott Murray, Phillip Prior, John Sirera, and Jerry Hutchinson. Admitting he could not recall the exact words used, Murray testified that when Bodolay departed from his prepared material he informed them ". . . that the Union didn't scare him and the workers thought it would help them and that it wouldn't because it wouldn't make him change his mind about anything . . . the Union wouldn't help . . . anybody get anything else . . . if they didn't like it . . . there's a lot of pavement out there." Murray could not recall whether Bodolay mentioned negotiations and a strike during the meeting. On direct examination, Prior testified that when Bodolay departed from his prepared material at the November 17 meeting he ". . . seemed to get upset and disturbed . . . and he dropped the paper down to his side and he told us, now, you people have anything to do with this Union, we know who you are and if you think I am going to negotiate with this Union you are all going to be out there. Then he pointed to the road." During cross-examination, Prior admitted that during the meeting under discussion, Bodolay may have said that if the Union wanted more money than Respondent wanted to give, the employees might be called out on strike and he admitted that when the reference to the pavement was made he took it as a reference to employees walking as pickets. Employee Sirera testified that when Bodolay departed from his prepared speech at the mid-November meeting he commented that: the Union could not give employees jobs or guarantee them jobs—that the Company's customers obtained at shows guaranteed them work; stated that he would not negotiate with the Union—that if they thought the Union was going to get any more money out of him to hit the pavement, hit it now; stated he would just shut down rather than have anything to do with the Union; and concluded by stating the Union is not going to do nothing for them, only him, selling machinery. During cross-examination, Sirera admitted he indicated in a pre-trial statement that he did not recall the exact words used by Bodolay at the meeting under discussion. He was unsure whether Bodolay made reference to strikers during the meeting. Jerry Hutchinson testified that during the mid-November meeting under discussion, Bodolay told them that if the Union got in there they would all be looking for jobs and he did not want to allow the Union to get in. He also recalled that Bodolay told them they could hit the bricks. He candidly admitted he did not remember every word that was said. Hutchinson was asked during cross-examination if Bodolay referred to hitting the bricks in connection with discussion of the Union's asking for more money than the Company wanted to give and going on strike. The witness could not recall.

When he appeared as a witness when Respondent was presenting its case, Bodolay indicated that documents placed in the record as Respondent's Exhibits 3(a) (Stevens' document) and 3(b) (a dissertation on strikes by the instant Union) were read to employees at the November 17 meeting. Bodolay asserted that his only departure from the written material occurred while he was reading from part of the text of Respondent's Exhibit 3(b). He claims he stopped reading from the text pertaining to strike action and turned around pointing to the street and indicated that in the event the Union were to come in and make economic demands on the Company which he felt were unreasonable, the only recourse under such circumstances could well be a strike.

The General Counsel does not contend that Respondent violated the Act by reading Respondent's Exhibits 3(a) and (b) to employees. Inspection of those documents reveals that the message of both is that employee selection of a union as their bargaining agent is an exercise in futility and can lead to strikes if a union asks for more than management is willing to give. Since each of the employees admitted they could not recall the exact statements made by Bodolay during the meeting, Prior indicated the impromptu comments were made in connection with discussion of negotiations and a possible strike, and Bodolay, who exhibited a thorough understanding of applicable law when he appeared as a witness, denied making any unlawful statements during the meeting, I

find that the General Counsel has offered insufficient reliable evidence to prove the allegations contained in paragraph 5 of the complaint and recommend that they be dismissed.[6]

The General Counsel sought to prove that Bodolay threatened employees with plant closure on or about March 30, 1981, through the testimony of employee Michael Wheeler. Wheeler testified that around the end of March or in early April 1981, during a meeting Bodolay held with employees from his department (the assembly department), he pointed to a union insignia on his hat and asked if that was one of the reasons employees would not be getting a raise. He did not indicate what Bodolay's reply was. After the departmental meeting, Wheeler claims he and an unidentified nonunion group approached Bodolay and asked if they could get at least a nickel raise. According to Wheeler, Bodolay told the group he was too ashamed to give the men a nickel raise. Wheeler claims Bodolay ended the discussion by stating that, as far as he was concerned, they knew what he thought about the Union--that if they were to come up and ask for a raise he would shut the doors.

Asked whether he ever told an employee he would close the doors of the plant if a union came in, Bodolay stated he never made such a statement directly or indirectly. Bodolay then stated his version of his discussions with Wheeler the day he met with assembly department employees indicating Wheeler pointed to his union button during the meeting and asked if that was the reason they were not getting any raises that quarter. Bodolay claims he replied that that had nothing to do with it—that it was a financial problem and he anticipated the cash flow trouble would continue until they could get their production in line with sales and so forth. Bodolay indicated he remained after the meeting and that Wheeler then approached him and pointed to his hat commenting he supposed he would not be getting a raise when wage reviews finally came around because of "this." Bodolay asserts he told Wheeler that the Union had absolutely nothing to do with money and cash flow. At that point Bodolay recalls that Wheeler asked about the possibility of a 5-cent raise. He claims his reply was that they planned no raise at that time; that on June 30 they would consider the situation and do what they could for employees with regard to raise increases.

Bodolay was a more impressive witness than Wheeler, whose testimony was vague and fragmentary. Absent corroboration of Wheeler's assertion that Bodolay informed the "non-union" group that he would close the doors if the Union asked for a raise, I am unable to credit Wheeler's assertion which was forcibly denied by Bodolay. I recommend that the allegation in question be dismissed.

The General Counsel sought to prove that Bodolay unlawfully interrogated an employee through the testimony of employee Orson Moore. Moore testified on direct examination that sometime in October Bodolay asked him why the people wanted a union—what was going on? He claims he replied it was the difference in pay between two people doing the same job as the fluctuation may be 50 cents, 75 cents, or $1 dollar. During cross-examination, Moore was asked if he had not volunteered such information to Bodolay during one of the latter's walks through the plant. He denied that such was the case and stated that he approached Bodolay after a group meeting and complained that an inexperienced man had been hired in for more pay than he was getting. He claims Bodolay asked if anything had been done about it, and he replied nothing. According to Moore, Bodolay then proceeded to ask him why the other people wanted a union.

Bodolay's version of his encounter with Moore was that the employee called him over while he was taking one of his customary walks through the plant. He asserts the employee initiated the conversation by asking him if he had a few minutes. He claims Moore then told him he had a lot of experience with unions, having been a member and an officer for years up north, and indicated that in his opinion a small plant like Respondent's did not need a union. According to Bodolay, Moore went on to say what they really needed was a parity of some kind in the wage structure, that in his opinion it was the most serious situation that was facing the employees. Bodolay indicated his part in the conversation simply consisted of thanking Moore for his opinion.

As indicated earlier, I found Bodolay to be an impressive witness most of the time. With respect to the Moore-Bodolay conversation, however, I found Moore to be the more impressive witness. Moore clearly indicated during the conversation why he personally favored the Union and he practically invited Bodolay to ask why other employees wanted the Union. I am convinced Bodolay accepted the indirect invitation and unlawfully interrogated Moore concerning the union sentiments of other employees as alleged.

5. Frank Mazzio

Paragraph 8 of the complaint alleges that Respondent, through the November 1 conduct of its production manager, Frank Mazzio, unlawfully interrogated an employee regarding his union sentiments and unlawfully threatened an employee with reprisals if he failed to renounce the Union. The General Counsel offered proof of the allegations through the testimony of employee William Kauffman. Mazzio was no longer employed by Respondent at the time of the hearing, and he did not appear to refute Kauffman's testimony.

Kauffman testified that in early November, Frank Mazzio, production manager, called him to his office, and asked him what were his feelings toward the Union. Mazzio said, "Whose side are you on? I have heard reports from all over the plant that you are affiliated with the union movement." Kauffman denied this. Mazzio continued, "I would like to take you off the fence and make you a full foreman, but I can't justify the salary based on what you are making on an hourly basis. I can't

[6] I specifically refrain from crediting Prior's assertion that Bodolay stated during the meeting that they (Respondent) knew the identity of union supporters and that he would not negotiate with the Union. Similarly, I refrain from crediting Sirera's assertion that Bodolay told them he would not negotiate with the Union and he would shut down rather than have anything to do with the Union. I am convinced that Bodolay is too well informed to have made such statements. Significantly, such testimony was not corroborated by others attending the meeting

put you in supervision at this time, but if you want to become part of management, you have to renounce all affiliation with the union."

I find that the General Counsel has proved through the testimony set forth that Mazzio interrogated Kauffman concerning his union sentiments as alleged. Additionally, I find that by informing Kauffman, in effect, that he would have to abandon the Union if he desired promotion to supervision, Respondent interfered with, coerced, and restrained Kauffman in the exercise of his Section 7 rights thereby violating Section 8(a)(1) of the Act.

6. Richard Litteral

Paragraph 9 of the complaint alleges that Assistant Foreman Richard Litteral unlawfully interrogated an employee concerning his union activities on November 15, and paragraphs 12 and 13 allege, in substance, that Respondent, through Litteral's conduct, disparately enforced a valid no-solicitation rule and denied an employee's request for a representative during an investigative interview which led to issuance of a verbal warning to the employee. The General Counsel sought to prove the described allegations through the testimony of employees Russell McDonald and Vincent Sirera.

Employee McDonald, formerly foreman of Respondent's machine shop, testified that around November 15 Litteral discovered a union newsletter lying on a workbench and picked it up, asking him (McDonald) if he knew whose it was. Thereupon, McDonald asserted Litteral threw the newsletter in the garbage and asked him "Have you been going to the union meetings?" McDonald indicated he answered affirmatively. When he appeared as a witness, Litteral denied he asked any employees whether they attended union meetings. He did not deny that the remainder of the newsletter incident described by McDonald occurred as indicated by the employee during his testimony. I credit McDonald and find that on or about November 15, 1980, Respondent, through Litteral's conduct, interrogated an employee concerning his union activities in violation of Section 8(a)(1) of the Act.

Respondent has maintained at all times material herein a no-solicitation rule which provides:

> In order to prevent disruption of operations, solicitation and distribution of literature will be limited as follows:
>
> Solicitations are not permitted by employees for any purpose during working time. An employee may not engage in solicitation of other employees while they are working.

The General Counsel contends that Respondent disparately enforced the above-described rule on November 14, 1980, by reprimanding employee Sirera for discussing the Union with another employee while it had previously permitted employees and members of supervision to solicit for Tupperware sales, football pools, and checkpools during their working time.

Employee Chartier indicated during his testimony that employees ran a football pool in the plant during the football season. He testified without contradiction that the afternoon-shift foreman, Sid Hart, participated in the pool and won it 3 weeks in a row. Additionally, he testified that Ted Fox, a leadman, sold Tupperware products on the premises. Similarly, employee Prior testified that employees participated in a checkpool every Thursday when checks were issued. According to Prior, Assistant Machine Shop Foreman Lee Bryson participated in the checkpool.[7]

According to employee Sirera, he took a part to the paint room, which was removed from the machine shop where he normally worked, on November 14 and the painter, Fred Grey, asked him to remove a piece of the part before he painted it. Sirera testified that while he was removing the part, Grey asked him a question about the Union. As Grey was very hard of hearing, Sirera answered him in a loud tone of voice. Thereupon, Assembly Foreman Litteral opened the door and asked Sirera to come with him. According to Sirera, they proceeded to Frank Mazzio's office with Litteral pausing near the lunchroom to request that employee Harold Renker accompany them. Sirera asserts that when Renker was asked to accompany them, he asked Litteral if he needed a witness and Litteral replied "No."[8] When the group arrived at Mazzio's office, Sirera asserts that Litteral informed him he should not be talking union to Fred Grey. Sirera claims he explained he was merely answering a question asked by Grey, and Litteral repeated that he should not be doing that and that concluded the conversation.[9]

On November 20, Sirera requested that he be permitted to see his personnel file so he could see if it contained anything about his union activities. He asked Litteral if there was anything in his file about the November 14 incident and claims Litteral assured him there was nothing in his file about his union activities. After following the chain of command up to Jack Bodolay, Sirera was permitted to see his personnel file which contained what was described as a written oral warning which recounted what had happened on November 14. The warning omitted any reference to Sirera's request for representation at the November 14 meeting in Mazzio's office.

Careful consideration of the facts outlined above causes me to conclude that the General Counsel has failed to show that Respondent disparately enforced its no-solicitation rule as alleged, but he has demonstrated that Sirera requested representation at an investigatory interview which he could have reasonably believed would lead to discipline and the request was denied.

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[7] Both employees failed to indicate whether the solicitation activity described was conducted at times when employees were working as opposed to break times, lunch periods, etc.

[8] Litteral denies that Sirera asked if he needed a witness and that he replied no. Sirera indicated the comment was made within Renker's hearing, but Renker was not called as a witness. When originally called as a witness by the General Counsel, Litteral stated he had nothing to do with the selection of employees for layoff or recall. Called by Respondent, he indicated otherwise. I credit Sirera where his testimony conflicts with that of Litteral.

[9] Litteral asserted that he asked the employee if he had been talking union with Renker, and Sirera admitted he had

To establish the claim of disparate enforcement of the rule, it was necessary for the General Counsel to establish that others violated the rule and were not reprimanded. He failed to satisfy that burden because he failed to establish that solicitation for participation in pools or for the sale of Tupperware was accomplished in violation of the rule; i.e., during working time or solicitation of employees while they were working. Accordingly, I recommend that paragraph 12 of the complaint be dismissed.

With respect to Litteral's refusal to grant Sirera's request for a witness on the occasion of the November 14 meeting in Mazzio's office, Litteral's admission that he asked the employee if he had been talking union with Grey, and the foreman's failure to indicate at that time that he was going to place an oral written warning in the employee's personnel file, convinces me that the incident constituted an investigatory interview. Considering the circumstances, I find that Sirera could have reasonably believed at the time of the interview that it might result in discipline. Under the rationale set forth in *Glomac Plastics, Inc.*, 234 NLRB 1309 (1978), and *Anchortank, Inc.*, 239 NLRB 430 (1978), such conduct is violative of Section 8(a)(1) of the Act. Accordingly, I find, as alleged, that Respondent violated Section 8(a)(1) of the Act by: refusing Sirera's request for representation at an interview which he could have reasonably believed would lead to discipline; compelling the employee to attend the interview without representation; and by issuing an oral written warning as a result of the interview conducted under the circumstances described.

C. *The Alleged 8(a)(3) Violations*

1. The contention of the parties

Paragraph 15 of the complaint, as amended, alleges that on December 5 and 8, 1980, Respondent terminated employees Russell McDonald, Robert Chartier, Donald Porter, Robert Dotson, Raymond Sprague, Scott Murray, and Jerry Hutchinson for discriminatory reasons, and that it thereafter refused to recall them because they were known union adherents.

When he appeared as a witness, Respondent's president Bodolay indicated that due to the economic situation which existed in late 1980, several large customers failed to order the equipment they could ordinarily have been expected to order and, consequently, Respondent found itself in a position wherein it had to decrease its operating cost by some $1,200 per week. To accomplish its object, it decided to eliminate its afternoon shift operation and reduce the work force by approximately 40 employees.

The General Counsel does not dispute the fact that economic conditions compelled Respondent to lay off 40 employees on December 5 and 8, 1980. Instead, he claims that the alleged discriminatees were selected for layoff because they were known union adherents and that employees who were known to be against the Union were retained even though they were less senior and/or less competent.

Respondent admitted that it was generally aware of the union sentiments of its employees when it selected employees for layoff. Its president, Bodolay, testified, however, that he instructed his supervisors, prior to the layoff, to select for retention the employees they felt should be retained to enable the Company to fulfill its production requirements. According to Bodolay, factors considered were ability to produce, attendance, attitude, and seniority. He further indicated that known union adherents were retained and persons known to be against the Union were selected for layoff.

2. The union activity and work qualifications of the alleged discriminatees

Donald Porter: Porter was hired by Respondent on March 8, 1979. While employed he worked in the machine shop on lathes and a Hurco machine. At the time of the layoff, he had approximately 1 year's experience operating and programing a Hurco machine. In September, he contacted the Union and arranged a meeting for employees with a union representative. He thereupon openly distributed union literature at the plant, wore a union button, and displayed a union emblem on his hat while on the job. One of the union newsletters documented an interview with Porter, wherein his prounion views were printed.[10]

As the record reveals that Porter's foreman, Hart, kept a record of the names of employees who wore union buttons and emblems and Porter openly engaged in union activity at the plant, I find that Hart, and Respondent, were fully aware of his prounion sentiments.

Porter testified he never received any complaints about his work. Porter was rated "good" in every category when reviewed on October 6, 1980. He was rated "good" in attendance and attitude, "fair" in quality of work, and "poor" in quantity of work when laid off; his final rating contains a notation "Steady but slow—Rejected parts higher than average. Tardiness problem also. Would not rehire."[11]

Robert Chartier: Chartier was hired by Respondent on October 29, 1979. He worked on the second shift as a Hurco operator. He testified he went to the first union meeting, distributed authorization cards, and wore a union hat and button in the plant. As revealed, *supra*, Hart told the employee on one occasion that Bodolay would close the plant if the Union got in.

Noting that Hart maintained a record of which employees wore union buttons and emblems and the fact that Chartier engaged in union activities openly at the plant, I find that Hart, and thus Respondent, were fully aware of his prounion sentiments.

Chartier was rated "good" in every category on October 6, 1980, but was rated good in all but attitude at the time of layoff and his rating sheet contained the notation "Loud & Boisterious. Keeps fellow employees stirred up. Would not rehire."[12]

Scott Murray: Murray was hired by Respondent on October 16, 1980. He operated a Hurco during his short tenure with Respondent at the Lakeland plant. Prior to his hire at the Lakeland facility, Murray had worked for

[10] See G.C. Exh. 14.
[11] See G.C. Exhs. 3 and 17.
[12] See Resp. composite Exh. 8.

Respondent while its plant was located in Wisconsin. While his union activity was limited to furnishing information about the Company's Wisconsin operation, he testified without contradiction that Respondent's shop superintendent, Russ Ehlers, knew when they were in Wisconsin that he was a union member and then held the position of sargeant-at-arms in the union. It is undisputed that Murray was still a probationary employee at the time of the early December layoff. I find that Respondent, through Ehlers, was aware of Murray's prounion sentiments.

Russell McDonald: McDonald was hired by Respondent on April 16, 1979. He had extensive machine shop experience and was thereafter made foreman of Respondent's machine shop. In the summer of 1980, he gave up his foreman position because he was unable to get along with Production Manager Mazzio. At that time, he became one of two inspectors. According to McDonald, his superior knowledge of math and specifications caused him to inspect difficult items while a younger inspector, Ayers, inspected easier items. As indicated, *supra*, Foreman Litteral ascertained around mid-November that McDonald had been going to union meetings. I find that Respondent was aware of McDonald's prounion sentiments.

McDonald's performance as an inspector was rated "good" in every category on June 23, 1980, when he was made group leader of the inspection department, and he was similarly rated "good" in every respect on October 6, 1980.[13] At the time he was laid off on December 8, 1980, McDonald was rated "good" in attendance and ability and "fair" in attitude and quality and quantity of work. A notation at the bottom of the December rating sheet states "Passive attitude—Employee did not seem too happy working here.[14]

Roger Dotson: Dotson was hired by Respondent on March 17, 1979. He was a drill press operator. He indicated during his testimony that he openly passed out union newsletters at the plant prior to the layoff and wore a union button and a union T-shirt in the plant. Since, according to the remarks made by Foreman Hart to employees, Respondent recorded the names of employees who wore union insignia, buttons, etc., in the plant, I infer that Respondent was aware of Dotson's prounion sentiments. According to Dotson, he passed out union newsletters during the lunch period on December 9, 1980. He thereafter went home sick and was then telephoned by Machine Shop Foreman Smith, who told him that he and a probationary employee, Joe Weisgerber, were being laid off.[15]

On October 6, 1980, Dotson was rated "good" in all categories except attendance for which he received a "fair" rating. The "Remarks" section of his rating form (G.C. Exh. 4) states, *inter alia*, "Attendance is the only negative factor here. Employee does excellent quality & quantity of work—Suggest 30¢ increase." Significantly, when he was laid off on December 8, 1980, Dotson was rated "fair" in all categories, had "good" also marked after attitude and ability and the rating sheet contained the notation "No Rehire."[16]

Raymond Sprague: Sprague was hired by Respondent on March 19, 1980. He started in the cutoff department and was transferred after several weeks to the machine shop as a milling machine operator. He testified that he signed a union authorization card and wore a union button in the plant several days during the week preceding his layoff on December 8. He testified without contradiction that his foreman (Smith) and assistant foreman (Bryson) observed him wearing the union button. I find that Respondent was aware of Sprague's prounion sentiments.

Sprague candidly admitted that he messed up some parts on occasion and "they" got mad. He claims he did not err any more frequently than other machinists. On October 6, 1980, Sprague was rated "good" in all categories except quality of work where he was rated both "good" and "fair."[17] The bottom of his rating sheet contained a notation that he was progressing well. When he was laid off on December 8, Sprague was rated "good" for attendance, attitude, quality of work, and ability. He was also rated "fair" for quality and quantity of work, and for ability. A notation in the "Remarks" column of the latter rating states (G.C. Exh. 15) "OK for Rehire Labor Position."

Jerry Hutchinson: Hutchinson was hired by Respondent as a welder on January 15, 1980. He testified he wore a union button in the plant during the union campaign. As indicated, *supra*, I credit his assertion that his foreman, Jim Connelly, asked him while he was wearing the button if he was with the Union. Hutchinson's name and his opinions were published in a union newsletter which was openly distributed at the plant. I find that Respondent was aware of his prounion sentiments.

Hutchinson indicated during his testimony that Respondent used five welders on the day shift and he was second in seniority among such welders. He indicated that Charles Henry and Gene Lynn, both junior to him in point of service, were retained when he was laid off on December 8, 1980. On October 6, 1980, Hutchinson was rated "good" in every category. At the time he was laid off on December 8, he was rated "fair" in every category except attendance where he was rated "good." The latter rating contained the notation "Do Not Rehire."[18]

3. The December layoffs

On December 5, Respondent abolished its night shift. As a result, 23 of 29 employees then assigned to the night shift were laid off. Those six employees then assigned to the night shift who were not laid off were transferred to the day shift.[19] As indicated, *supra*, the

[13] See G.C. Exhs. 5 and 6.

[14] See G.C. Exh. 18

[15] With exception of Dotson and Weisgerber, the employees laid off on December 8 were laid off at the beginning of the shift. Dotson testified without contradiction that when he became ill he discussed his illness with Foreman Smith and stated he would go home but he was afraid he might be laid off if he did. Smith advised him not to worry and he went home only to receive the layoff call later.

[16] See G.C. Exh. 16.

[17] See G.C. Exh. 2.

[18] See G.C. Exhs. 12 and 13.

[19] The six retained were: leadman Fox, William Kauffman, Charles Henry, Bruce Hildreth, James France, and Bruce McPherson. Additionally, Foreman Hart was retained.

General Counsel contends that Respondent decided to lay off night Hurco machine operators Porter and Chartier for discriminatory reasons. Additionally, he claims that the transfer of Hurco machine operator Hildreth to the day shift, and the subsequent layoff of day-shift Hurco operator Murray was also effectuated for discriminatory reasons. The layoff as it affected Hurco machine operators is discussed below.

The day-shift employees involved in the December layoff were terminated by Respondent on December 8. Among those chosen for layoff were alleged discriminatees Russell McDonald, Roger Dotson, Raymond Sprague, and Jerry Hutchinson. McDonald was an inspector at the time and the remaining named individuals were performing work in Respondent's machine shop. The individual situations of the alleged discriminatees involved in the December 8 layoff are discussed below.

a. *The alleged discrimination against Donald Porter, Robert Chartier, and Scott Murray*

On December 4, the employees working on Hurco machines on the night shift were: Donald Porter (hired 3-8-79); Robert Chartier (hired 11-26-79); Larry Pinker (hired 5-22-80); and Chris Outlaw (hired 5-29-80). At that time the Hurco machine operators assigned to the day shift were: Les Gaborik (hired 4-4-77); John Hanson (hired 1-18-78); Don Smith (hired 5-1-78); Gary Oman (hired 2-12-80); and Scott Murray (hired 10-16-80). On December 5, Porter, Chartier, Pinker, and Outlaw were laid off. On December 8, Hildreth was transferred to the day shift and Murray was laid off. It is thus apparent that two senior employees—Porter and Chartier—were laid off while junior employees Hildreth and Oman were retained.

Having adduced the testimony concerning the alleged discriminatees set forth above, the General Counsel claims he has satisfied his burden of proof described in *Wright Line*,[20] and he urges me to find that he has shown, *prima facie*, that Respondent was motivated to lay off Porter, Chartier, and Murray because they were known union adherents. I agree as to Porter and Chartier, but conclude that the General Counsel failed to establish *prima facie* that Murray was selected for layoff for discriminatory reasons.

With respect to Porter and Chartier, the record facts which, in my opinion, establish, *prima facie*, that they were selected for layoff for discriminatory reasons are: (1) they were considered to be excellent employees, as late as October 6, 1980, as evidenced by their performance ratings prepared on that date; (2) both employees openly supported the Union by attending meetings, openly distributing union literature at the plant, and by wearing union buttons and emblems on the job; (3) Respondent, through its night-shift foreman, kept a record of employees wearing union buttons and emblems, and it must be concluded that Respondent was fully aware of Porter and Chartier's prounion sentiments; (4) Porter and Chartier, like all other alleged discriminatees excepting Sprague, were rated poorly at the time of the layoff and their rating sheets contained notations that they should not be rehired; and (5) junior employees Hildreth and Oman (trained by Chartier) were retained to perform work which could have been performed by Porter and Chartier.

While I have found that Murray supported the Union and I have found that Respondent was aware of his advocacy, the record reveals that he was a probationary employee at the time of the layoff and it reveals that Porter, Chartier, Pinker, and Outlaw, all senior in service to Murray, were laid off at or near the same time. Moreover, all the Hurco operators retained, including Hildreth and Oman, were senior to Murray. In the circumstances, I am unwilling, absent specific evidence of discriminatory motivation, to find that the General Counsel has shown, even *prima facie*, that Murray was treated discriminatorily.

Having concluded that the General Counsel has proved *prima facie* that Porter and Chartier were selected for layoff for discriminatory reasons, I turn to an examination of Respondent's defense to ascertain whether it has demonstrated that the employees in question would have been terminated on December 5 in the absence of their protected activities. Respondent presented its defense through Assistant Machine Shop Foreman Bryson since both Hart, the night foreman, and Smith, the machine shop foreman, were unavailable at the time of the hearing. Bryson testified that on December 2, supervision consisting of Russ Ehlers, Dick Smith, Dick Litteral, Jim Connelly, Sid Hart, Frank Mazzio, and himself, met at Ehleras' house and decided who would be laid off on December 5 and 8. With respect to Hurco machine operators, he asserted that he, Hart, and Smith agreed that Hildreth would be retained and transferred to the day shift because he was acting as a Hurco machine leadman on the night shift and could program the Hurco machines better than Porter and Chartier. Bryson indicated in addition that Porter had an abnormal amount of scrap and had fouled up parts for a glove packing machine in late November thereby necessitating that the parts be rebored several times. He claimed Chartier was selected for layoff because Hildreth was a superior programer and was able to program Sentamatic, Burkmaster, and Hurco machines while Chartier did not have such skills. Bryson made no attempt to explain why Oman, who was junior to both Porter and Chartier, was retained at the time of the layoff.

During the rebuttal stage of the case, Chartier testified that Hildreth did not perform leadman functions while assigned to the night shift, and he claimed that Hildreth did not program the Hurco machine he operated. Porter denied during rebuttal that he produced an abnormal amount of scrap and he denied that he produced defective parts for a glove machine in late November. As Bryson admittedly worked on the day shift and did not actually observe what Porter, Chartier, and Hildreth did while working on the night shift, Porter and Chartier's rebuttal testimony causes me to discount Bryson's testimony considerably.

In sum, the record reveals that regardless of Hildreth's programming skills, he, subsequent to December 8, merely operated a Hurco machine on the day shift as did

[20] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

employee Oman. This was work Porter and Chartier were capable of performing. In the circumstances, I conclude that Respondent has failed to show that Porter and Chartier would have been selected for layoff on December 5 if they had not been known union advocates. Accordingly, I find, as alleged, that Porter and Chartier were terminated on December 5, 1980, in violation of Section 8(a)(1) and (3) of the Act as alleged.

b. *The alleged discrimination against Russell McDonald*

On December 8, McDonald and employee Troy Ayers performed the inspection functions at Respondent's facility. As found, *supra*, McDonald had attended a union meeting and Respondent was aware of such activity. Nevertheless, the record reveals that when the night shift was abolished, the supervisory gathering decided that night-shift Foreman Hart would transfer to the day shift and perform inspection duties and that McDonald and Ayres would be laid off. Bodolay and Bryson indicated during their testimony that supervisors and leadmen were given retention preference at the time of the December layoffs. Inspection of Respondent's Exhibit 4, a listing of employees which reveals, *inter alia*, their status, shift, and whether they were laid off or retained during the December layoffs, corroborates the assertion that supervisors and leadmen were given the retention preference at the time in question. In the circumstances, I find that Respondent was motivated by lawful considerations to retain Foreman Hart to perform inspection work at the time of the layoffs. I further find that the General Counsel has failed to establish, *prima facie*, that McDonald was selected for layoff for discriminatory reasons.

c. *The alleged discrimination against Roger Dotson*

Immediately prior to December 8, Dotson was a drill press operator in Respondent's machine shop where he was supervised by Smith and Bryson. At that time, Respondent employed eight drill press operators. They were: Henry Weeks (hired 1-15-79 and also lead operator);[21] Darrell Hurry (hired 12-13-79); Ken Morey (hired 2-11-80); Delbert Clegg (hired 3-17-80); Roger Dotson (hired 3-17-80); Orson Moore (hired 3-24-80); Jerry Vanderground (hired 10-2-80); and Robert Weisgerber (hired 10-13-80). Clegg, Moore, and Vanderground worked on the night shift and were laid off on December 5. Thereafter, on December 8, Dotson and Weisgerber were laid off after other employees had been laid off earlier in the day as described, *supra*. It thus appears that Respondent retained, at the time of the layoff, Weeks, Hurry, and Morey who were all senior to Dotson. Bryson testified that supervision decided to lay Dotson off because it had a more senior drill press operator who was senior to Dotson (Morey).

Consideration of the entire record causes me to conclude that the General Counsel has failed to establish, *prima facie*, that Dotson was chosen for layoff for discriminatory reasons. The General Counsel made no attempt to prove that Dotson was more qualified to operate a drill press than the three more senior employees who were retained at the time of the layoff.

d. *The alleged discrimination against Raymond Sprague*

Prior to the December 5 and 8 layoffs, Respondent utilized 14 milling machine operators. Seven, including Sprague, were laid off on the above dates. Three of the seven operators retained (Racicot, Prite, and McPherson) were hired after Sprague, but the record reveals that Sprague had worked on a milling machine for only several months prior to the lay off. Moreover, Sprague, by his own admission, was an inexperienced milling machine operator who made mistakes. Significantly, although Sprague was rated "fair" to "good" when laid off on December 8, the rating form reflects a recommendation that he be rehired as a laborer.[22]

While I have found that Respondent was aware at the time of the December 8 layoff that Sprague was a union supporter, I conclude that the General Counsel has failed to establish, *prima facie*, that he was selected for layoff for discriminatory reasons. Absent specific evidence which would reveal that Respondent's supervisors harbored resentment against Sprague because he had engaged in union activities, I am unwilling to infer that he was selected for layoff for discriminatory reasons.

e. *The alleged discrimination against Jerry Hutchinson*

Before the layoffs, Respondent utilized four employees classified as welders. They were: Maurice Lefler (hired 2-26-79); Charles Henry (hired 6-2-80); Jerry Hutchinson (hired 1-15-80); and Eugene Lynn (hired 7-23-80). Hutchinson was laid off on December 8 and junior welders Henry and Lynn were retained.

As found, *supra*, Foreman Connelly interrogated Hutchinson concerning his union sentiments when he observed him wearing a union button, and the foreman subsequently told the employee not to post union newsletters on company property. While Hutchinson was apparently felt by Respondent to be a good employee on October 6, 1980, as reflected by the rating he received at that time, he was rated "fair" in every category except attendance on December 8, and, like all the alleged discriminatees except Sprague, the December 8 rating form contains a notation "Do Not Rehire."[23]

Finally, the General Counsel has shown that employees hired after Hutchinson were retained when he was laid off. The factors summarized cause me to conclude thnt the General Counsel has established, *prima facie*, that Hutchinson was selected for layoff for discriminatory reasons.

Respondent sought to explain why Hutchinson was selected for layoff through the testimony of Sheet Metal Department Foreman James Connelly. Connelly initially explained that prior to the layoff he actually utilized three welders—Lefler, Henry, and Hutchinson—and two finishers—Lynn and an unidentified employee. Connelly further indicated that while Henry's last date of hire was

[21] See Resp. Exh. 4.

[22] See G.C. Exh. 15.

[23] See G.C. Exhs. 12 and 13.

June 2, 1980, he actually had more time with the Company than Hutchinson as he had been hired in 1979 and had left Respondent's employ for about a month in 1980 and was thereafter rehired.[24] According to Connelly, Lynn was retained to perform menial tasks which required no particular degree of intelligence such as polishing, grinding, and minor welding tasks. While Connelly admitted he had observed Hutchinson wearing a union button, he testified that did not influence his decision to select the employee for layoff.

In sum, while Respondent has given plausible reasons for retaining welders Lefler and Henry during the layoff period, Connelly did not offer any plausible reason for retaining Lynn, who is classified as a welder on Respondent's Exhibit 4, and an unnamed finisher when senior employee Hutchinson was laid off. Assuming, *arguendo*, Lynn and the other finisher performed polishing, grinding, and minor welding, it is clear that Hutchinson was capable of performing such work, but he was not offered the opportunity to accept such work in lieu of layoff. I find that Respondent has failed to rebut the General Counsel's *prima facie* showing that Hutchinson was selected for layoff for discriminatory reasons. Accordingly, I find that Hutchinson was terminated in violation of Section 8(a)(1) and (3) of the Act as alleged.

4. The recall situation

In the amendment to complaint dated April 27, 1981, the General Counsel alleged that Respondent failed for discriminatory reasons to recall employees McDonald, Chartier, Porter, Dotson, Murray, Sprague, and Hutchinson to their former positions of employment on February 16, 1981.

The record reveals that Respondent had a need for the services of laid-off machine shop employees by mid-February 1981. To fill the need, it sent recall letters on February 16, to Orson Moore (drill press operator hired 3-24-80), Larry Pinker (Hurco operator hired 5-22-80), Robert Lyman (milling machine operator hired 9-23-80), Russ Parsons (milling machine operator hired 5-12-80), Robert Weisgerber (drill press operator hired 10-13-80), Troy Ayres (inspector hired 4-30-80), and James Mallard (milling machine operator hired 9-15-80).[25] Lyman, Parsons, and Ayres responded by reporting for work on February 23. The remaining four employees either failed to claim their registered recall letters or failed to report for work on receipt of such letters.[26]

According to Bodolay and Bryson, Respondent decided to recall the employees listed above in February because Smith and Bryson felt they could best perform the work which needed to be performed. They indicated Ayres was offered recall before McDonald because the Company was still in financial difficulty and Ayres' hourly rate was approximately $1.50 less than McDonald's.

When the majority of employees recalled on February 16 failed to return to work, Respondent, on February 20, sent recall letters to all remaining machine shop employees on layoff except McDonald. Bryson testified without contradiction that he and Smith felt Ayres could accomplish the necessary inspection work and consequently McDonald's services were not needed. The record reveals 17 machine shop employees were sent recall letters on February 20. While registered letters were sent to all the alleged discriminatees except McDonald, Hutchinson was the only alleged discriminatee to report back to work at Respondent. Chartier failed to claim his recall letter, Porter failed to respond after receiving his recall letter, Dotson accepted recall but failed to show up to work, and Murray and Sprague failed to respond after receiving their recall letters.[27]

Consideration of the facts set forth above leads me to conclude that the General Counsel has failed to prove that Respondent refused to recall Chartier, Porter, McDonald, Dotson, Sprague, Murray, and Hutchinson on February 16 for discriminatory reasons. The fact that three known union supporters were included in the small group offered recall on February 16 is hardly supportive of the General Counsel's claim, and the fact that all the alleged discriminatees except McDonald were offered recall 4 days later on February 20 convinces me that Respondent's principal concern was to obtain employees who could perform the work available as it contends. With respect to McDonald, the General Counsel's claim is that he should have been recalled before Ayres even though Ayres made $1.50 per hour less. The General Counsel's failure to controvert Respondent's contention that it was experiencing financial difficulty during the period under discussion undercuts his position. Moreover, as revealed, *supra*, the record reveals that McDonald was no more active than most employees during the union campaign and Respondent's recall of numerous known union activists on February 16 and 20 suggests that McDonald was refused recall for reasons other than his union activity and/or sentiments.

In sum, I find that Respondent did not fail on February 16, 1981, to recall Chartier, Porter, McDonald, Dotson, Murray, Sprague, and Hutchinson for discriminatory reasons. I recommend that the applicable paragraphs of the complaint be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[24] Henry was originally hired by Respondent in October 1979; he quit on April 18, 1980; he was rehired on June 2, 1980. See G.C. Exhs. 19 and 20.

[25] See Resp. Exhs. 5 and 6.

[26] Bryson testified without contradiction that Respondent knew on February 16 that Moore, Weisgerber, and Mallard were union supporters.

[27] See Resp. Exh. 6.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the unlawful acts described in section III, above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. Respondent has not violated the Act except to the extent specifically indicated in section III, above.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be ordered to make Robert Chartier, Donald Porter, and Jerry Hutchinson whole for any loss of earnings they suffered as a result of the discrimination practiced against them with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be computed and paid in accordance with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[28]

Having found that Vincent Sirera was unlawfully disciplined on November 14, 1980, I shall recommend that Respondent be ordered to expunge all reference to the incident from its records.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[29]

The Respondent, Bodolay Packaging Machinery, Inc., Lakeland, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees regarding their union activities or sentiments or the union activities or sentiments of their fellow employees.

(b) Creating the impression that the union activities of its employees are under surveillance.

(c) Intimidating employees by threatening plant closure if employees select the Union as their collective-bargaining agent.

(d) Discouraging employee participation in union activities by informing employees that their participation in union activities caused them to be laid off.

(e) Requiring that any employee take part in an interview with supervision without the presence of an employee representative if such representation has been requested by the employee and if the employee has reasonable grounds to believe that the matters to be discussed may result in subjecting the employee to disciplinary action.

(f) Discouraging employees from joining or participating in activities on behalf of United Electrical, Radio, and Machine Workers of America (UE), or any other labor organization, by selecting employees for layoff because they joined or supported a union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole Robert Chartier, Donald Porter, and Jerry Hutchinson for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its Lakeland, Florida, facility copies of the attached notice marked "Appendix."[30] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[28] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). As Respondent sent each of the named employees registered letters offering them recall to their former positions of employment on February 20, 1981, and Hutchinson accepted the offer made to him while Chartier and Porter did not, Respondent will not be ordered to offer said employees reinstatement.

[29] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[30] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."